U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: April 30, 1991

Case No: 89-INA-261

IN THE MATTER OF

INTERNATIONAL STUDENT EXCHANGE OF IOWA, INC.,
Employer

on behalf of

INGRID CASILLO NIELSEN,
Alien

Peter M. Wessels, Esquire
For the Employer

Before: Glennon, Silverman and Romano
Administrative Law Judges

By: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) (the "Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General tha, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing and qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

The procedures governing labor certification are set forth at 20 C.F.R. §656. An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements have been met. These requirements include the responsibility of the employer to recruit U.S. workers

at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review as contained in the Appeal File [hereinafter (AF)], and any written arguments of the parties. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

International Student Exchange of Iowa, Inc., the Employer, filed an application dated July 27, 1988, seeking alien employment certification on behalf of Ingrid Casillo Nielsen, the Alien. The job title on Form ETA-750 was, "Assistant to Foreign Student Placement Administrator," and duties were listed as:

> "1. Setting up foreign publicity and at least once annually, meeting with foreign representatives, foreign students and their parents;
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> 2. Checking and translating important documents pertinent to student dossiers (reference letters, personal statements, transcripts, etc.);
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> 3. Conducting orientation sessions for foreign students upon arrival (or before departure from their home countries) and preparing American students for their stays abroad;
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> 4. Advising and counseling the students over the phone and on routine visits.
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> 5. Other administrative duties including computer data entry and word processing and various accounting and secretarial tasks."

Requirements for the job were: A Bachelor of Arts Degree in Languages and fluency in English, Spanish, and two of the following: French, German, Italian, Japanese. The Employer notes that this selection of languages is needed to complement the languages spoken by the administrator and is needed for assistance to exchange students not fluent in English (AF 75).

A final documentation filed by the Employer reports that resumes were received from four applicants, none of whom possessed the minimum qualifications, and all had been rejected without interview (AF 104). On March 31, 1989, the Certifying Officer (C.O.) issued a Notice of Findings (NOF) proposing to deny certification (AF 59). This 7-page document containing some 34 questions plus requirements for several corrections and revisions of the application and advertisement and additional documentation, appears to be based on findings that the job offer is unduly restrictive in requiring a B.A. degree in languages and fluency in foreign languages; fails to show a business necessity for the combination of duties; does not specify the Employer's actual minimum requirements; unlawfully rejects qualified U.S. workers; and that the job offer had not

been shown to be open to U.S. workers.

On May 4, 1989, the Employer filed its rebuttal (AF 38) and on May 11, 1989, the C.O. issued a Final Determination (FD) denying certification (AF G). The denial was based on findings that the job did not appear to be open to qualified U.S. workers, the language requirements were unduly restrictive, a failure to document a need for the combination of duties, and rejection of one U.S. applicant for other than lawful, job-related reasons. The Employer filed a timely appeal to the Board.

DISCUSSION AND CONCLUSIONS

The lengthy rebuttal submitted by the Employer has clearly satisfied most of the questions raised by the C.O. in the Notice of Findings. We turn, therefore, to the issues raised on appeal of the FD and the bases for denial as specified by the Certifying Officer.

Section 656.21(b)(2)(i)(C) provides that the job opportunity shall not include a requirement for a language other than English, unless that requirement is adequately documented as arising from business necessity. To establish business necessity, an Employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of Employer's business and are essential to perform in a reasonable manner the job duties as described by Employer. Information Industries, Inc., 88-INA-82 (2-9-89) (en banc).

Under the first prong of the business necessity test Employer must establish that the requirement of fluency in English, Spanish, and two other languages bears a reasonable relationship to the position in the context of the Employer's business.

The Employer is a nonprofit corporation engaged in the placement of foreign students in U.S. schools and U.S. students in foreign schools and has been designated by the U.S. Information Agency as an Exchange-Visitor Program. Its clients are teenagers and their parents in the United States, Europe, Central and South America. The officers, directors, and, currently, the only full-time employees are Mr. & Mrs. Imre Takacs, who operate the enterprise from their home.[1] Foreign students come from France, Germany, Spain, Italy, Mexico, Columbia, Japan, and Turkey. While the students must have a knowledge of English, frequently their parents do not. Both Mr. & Mrs. Takacs travel frequently to foreign countries to interview applicants and their families. Both have multilingual ability, which is essential to the travel and performance of their duties. At home, there is frequent and constant need for fluency in foreign languages in correspondence, and personal, or telephonic discussions. The need varies from 40% to 80% of the time.

The C.O. rejected the rebuttal, notwithstanding the extensive explanation of the nature and

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[1] Starting in January, 1989, the company has hired a part-time helper for office duties. The Alien was employed for a 12-months period authorized in connection with her completion of college degree.

demands of the business, finding it not sufficient documentation. Written statements by an employer, however, constitute adequate documentation when reasonably specific and indicate their sources and bases. In re Gencorp, 87-INA-659 (1-12-88). The Employer's statements of record demonstrate that the very essence of its activities require communication in many foreign languages and clearly meet this standard. See: First Alabama Bancshares, Inc., 88-INA-250 (11-28-89). The job offer requires daily communication, both in the U.S. and abroad, with persons who do not speak English, or who are better able to communicate in their own language.[2]

Under the second prong of the business necessity test, the Employer must establish that the foreign language fluency is essential to perform the job duties in a reasonable manner. We find, as noted above, that this burden has also been met. See: Jung Gil Choi, C.P.A., 88-INA-254 (3-27-90) and cases cited.

Denial of certification was also based on a failure to document a business necessity for the combination of duties, described by the CO as, "Advisor, translator and secretary." The rebuttal is convincing that the business is expanding and additional help is needed by a person having qualifications similar to Mr. & Mrs. Takacs. In a two-week period, over 100 Spanish candidates were interviewed in Madrid, about 75 at Tours, France, and meetings were held in Germany and Italy. That office records and correspondence would be required in such an operation is apparent. It is obvious that with only 2-3 persons conducting all facets of the operation, each would have to participate in the various functions referred to as a "combination of duties." We find the Employer's statement on rebuttal to be sufficient documentation to show a business necessity for the requirement of combined duties. See Lippert Theatres, 88-INA-433 (5/30/90) (en banc).

The CO also denied certification based on a finding that the job had not been shown to be clearly open to any qualified U.S. workers. This results from findings that the Alien is the adopted daughter of the Takacs and that a qualified U.S. applicant had been rejected.

On rebuttal, the Employer asserts that a Bachelor of Arts Degree in Languages is required in order to maintain the Employer's status in the business of placement of U.S. and foreign students. The degree in languages is considered a necessary indicia of proficiency, and the Employer notes that all its foreign coordinators in Europe, Central and South America hold degrees in foreign languages. It is of record that the U.S. applicant considered qualified by the CO does not have this degree. The Employer considers it essential to be represented, particularly in foreign countries by a person having proper academic credentials. This determination is entitled to some deference. Ratnayake v. Mack, 499 F.2d 1207 (8th Cir. 1974). We conclude that the special nature of the Employer's business makes the possession of a degree in languages of particular significance in the efficiency and quality of the business, and essential to perform the job. Consequently, the U.S. worker cannot be found to have been unlawfully rejected.

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[2] When determining whether a foreign language requirement arises from business necessity, it is sufficient if Employer's clients and/or customers choose to use their native language, rather than English. Alywa Computer Corp., 88-INA-218 (9-21-89).

The record establishes that the Employer corporation is not a sham, or scheme, for obtaining certification. It existed without the Alien and there is no evidentiary basis to conclude that it could not continue to exist without her if a qualified U.S. worker was available to fill the position. The Alien was not involved in the organization of the Employer corporation and has no interest , or control, in it. There is no indication that the nature of the Employer's business changed in response to the Alien's involvement. The Alien occupies no managerial function and has no control over selection of the person to fill the job. While the Alien is now a family member, there is no indication that the job was created for her benefit. See: Hall v. McLaughlin, 864 F.2d 868 (D.C. Cir. 1989); Lignomat, USA, 88-INA-276 (10/24/89) (en banc); Paris Bakery Corp., 88-INA-337 (1-4-90). In compliance with orders of the Missouri Division of Employment Security, the notice of job offer was posted at the placement office of Lindenwood College in St. Charles, Mo., and published in the October, 1988, issue of the National Association of Foreign Student Affairs Newsletter. The validity of the recruitment efforts has not been questioned. We conclude that no basis exists for finding that this job was not clearly open to any qualified U.S. worker.

Upon consideration of the entire record, we find that certification should be granted.

ORDER

The Final Determination of the Certifying Officer denying certification is hereby REVERSED, and the certification is GRANTED.

For the Panel:

RALPH A. ROMANO
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with the Chief Docket Clerk, Office of Administrative Law Judges, Suite 700, 1111 20th Street, N.W., Washington, D.C. 20036. Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double spaced pages. Upon the granting of a petition the Board may order briefs.